Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

No. 02-626

In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner's longstanding practice of pumping accumulated water from a water collection canal to a water conservation area within the Florida Everglades constitutes an addition of a pollutant from a point source for purposes of Section 402 of the Clean Water Act, 33 U.S.C. 1342, where the water contains a pollutant but the pumping station itself adds no pollutants to the water being pumped.

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INTEREST OF THE UNITED STATES

Petitioner South Florida Water Management District (SFWMD) operates an extensive system of levees and canals. Among other activities, it pumps accumulated water, which would otherwise flood populated areas, from water collection canals to water conservation areas within the Florida Everglades region. The question presented in this case is whether the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, requires the SFWMD to obtain a permit under the National Pollution Discharge Elimination System (NPDES) before engaging in that activity. See CWA § 402, 33 U.S.C. 1342. The United States has a substantial interest in this question because the Environmental Protection Agency (EPA) administers the NPDES permitting program in conjunction with individual States that have assumed respon-

sibility for issuing permits within their borders. See CWA § 402, 33 U.S.C. 1342. The United States has a particular interest in this case because of its role in implementing the Comprehensive Everglades Restoration Plan, which the Secretary of the Army developed in consultation with the parties to this action and in conjunction with a host of other federal, state, tribal, regional and local agencies, to address regional water quality issues. At the Court's invitation, the Solicitor General filed a brief amicus curiae in response to the petition for writ of certiorari. The United States submits that the court of appeals erred in requiring the SFWMD to obtain an NPDES permit because the SFWMD's pumping activity does not result in "the discharge of any pollutant" (33 U.S.C. 1342(a)) within the meaning of the Clean Water Act.

STATEMENT

Petitioner operates numerous water control facilities in southern Florida, including the C-11 canal, which collects accumulated water from heavily populated portions of Broward County, and the S-9 pumping station, which discharges that water into Water Conservation Area-3A (WCA-3A), adjacent to the Everglades National Park. Pet. App. 2a-3a. The pumping station itself does not add any pollutant into the discharged water. *Id.* at 3a. The C-11 canal water contains, however, higher levels of phosphorus than the waters in WCA-3A. *Ibid.* Respondents, the Miccosukee Tribe of Indians and the Friends of the Everglades, brought suit in the United States District Court for the Southern District of Florida, asserting that petitioner must obtain an NPDES permit under Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342, to engage in the pumping activity. Pet. App. 2a. The district court ruled on summary judgment that petitioner must obtain an NPDES permit and granted respondents' request for an injunction. *Ibid.* The

court of appeals affirmed the district court's determination that a permit was necessary, but vacated the injunction and remanded the case for further proceedings. *Id.* at 14a.

A. The Clean Water Act

Congress enacted the Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, to respond comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. CWA § 101(a), 33 U.S.C. 1251(a). That enactment and its amendments, now commonly known as the Clean Water Act, establish an important role for the federal government, but they also recognize the primary responsibilities of the individual States to protect water quality and to manage water resources, including "the authority of each State to allocate quantities of water within its jurisdiction." CWA § 101(b) and (g), 33 U.S.C. 1251(b) and (g).

The Clean Water Act addresses the problem of water pollution through a multi-faceted federal-state approach that includes provisions directed to research and related programs (Subch. I, 33 U.S.C. 1251-1274), grants for construction of treatment works (Subch. II, 33 U.S.C. 1281-1301), the establishment and enforcement of standards, including effluent and water quality standards (Subch. III, 33 U.S.C. 1311-1330), and the issuance of permits and licenses (Subch. IV, 33 U.S.C. 1341-1346). The Act also contains general provisions, including definitions of key terms (Subch. V, 33 U.S.C. 1361-1377), and provisions respecting grants to States for water pollution control revolving funds (Subch. VI, 33 U.S.C. 1381-1387).

The focus of the dispute in this case is the Clean Water Act's provisions for controlling the discharge of pollutants into navigable waters. Section 301(a) of the Act states:

> Except as in compliance with this section [301] and [Sections 302, 306, 307, 318, 402 and 404 of the Clean Water Act], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. 1311(a). The identified sections impose various types of pollution control requirements.

For example, Sections 301 and 302 direct EPA to establish specified types of effluent limitations. See 33 U.S.C. 1311, 1312; see also 33 U.S.C. 1362(11) (defining "effluent limitation"). Section 306 directs EPA to establish standards of performance for new sources, 33 U.S.C. 1316, and Section 307 directs EPA to establish standards for toxic pollutants and pretreatment of discharges into treatment works, 33 U.S.C. 1317. See 33 U.S.C. 1316(a) (defining "standard of performance" and "new source"); 33 U.S.C. 1362(13) (defining "toxic pollutant"). Section 318 addresses discharges of pollutants from aquaculture projects. 33 U.S.C. 1328.

This case implicates Section 402, which creates the NPDES permitting program. See 33 U.S.C. 1342. Section 402(a)(1) provides that EPA (or a qualifying State) "may, after the opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the Clean Water Act]," upon condition that such discharge will meet specified requirements. 33 U.S.C. 1342(a)(1). Section 404 establishes a separate permitting program, administered by the Army Corps of Engineers, specifically directed to the "discharge of dredged or fill materials." See *Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), aff'd, 123 S. Ct. 599 (2002) (per curiam). This case does not involve the discharge of dredged or fill materials, and that federal permitting program is not at issue in this case.

The Section 402 permitting program regulates the "discharge of any pollutant," 33 U.S.C. 1342(a)(1), which is a

statutory term of art. Section 502(12) of the Clean Water Act defines the term "discharge of a pollutant," in relevant part, as:

> any addition of any pollutant to navigable waters from any point source.

33 U.S.C. 1362(12). Section 502(6), in turn, defines the term "pollutant" to include a variety of materials, such as "industrial, municipal, and agricultural waste." 33 U.S.C. 1362(6). Section 502(7) defines the term "navigable waters" to mean "the waters of the United States." 33 U.S.C. 1362(7). And Section 502(14) defines the term "point source" to mean "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14).[1]

The Clean Water Act's distinction between point sources and nonpoint sources reflects an important legislative judgment. Congress recognized that a wide variety of human and nonhuman activities affect water quality and that the government's response to water pollution must be tailored to the nature of the activity and the severity of the threat. Congress determined that, as a general matter, federal permitting programs, such as the NPDES regime, are the appropriate regulatory response for addressing the addition of pollutants to the waters of the United States from "discernible, confined and discrete conveyance[s]," but that different

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[1] The Clean Water Act uses, but does not define, the term "nonpoint source." CWA §§ 208, 319, 33 U.S.C. 1288, 1329. The textbook examples of nonpoint sources are various forms of runoff, which reach waterbodies by flowing over or percolating through topographical features. See, *e.g.*, Robert Percival et al., *Environmental Regulation* 630 (3d ed. 2000); *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) ("Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source."), cert. denied, 123 S. Ct. 2573 (2003).

approaches are the more appropriate response in other circumstances.

For example, the Clean Water Act's NPDES permitting program typically imposes limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents at the point where the discharge stream enters the waters of the United States. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122, 125; see, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000). The Clean Water Act does not impose, however, analogous requirements for nonpoint sources. Instead, Sections 208, 304(f), and 319 encourage the States to develop local programs, that may include techniques such as land use requirements, to control nonpoint sources of pollution. See, *e.g.*, 33 U.S.C. 1288(b)(2)(F); 33 U.S.C. 1314(f), 1313(f), 1329.

The Clean Water Act provides mechanisms for enforcing the NPDES permit requirements. Section 309 provides that the government may respond to violations by issuing compliance orders, pursuing injunctive relief, and seeking criminal and civil penalties. See 33 U.S.C. 1319. Section 505(a) additionally authorizes "any citizen" to commence a civil action against any person alleged to be in violation of an effluent standard or limitation under the Act. 33 U.S.C. 1365(a). District courts presiding over such "citizen suits" have jurisdiction to enforce permit requirements and order payment of civil penalties as provided in Section 309. *Ibid.* See, *e.g.*, *Friends of the Earth*, 528 U.S. at 175-176.

B. The SFWMD's Water Control Activities

The SFWMD has responsibility for operating water control facilities in southern Florida, which has unique hydrological characteristics. See Fla. Stat. Ann. § 373.069 (West Supp. 2003). The dominant feature of the area is the Everglades, a wetlands system that once encompassed much of

southern Florida. To accommodate human habitation, the State of Florida and the United States, through the Army Corps of Engineers (Corps), have constructed elaborate projects that have altered the natural flow of water. While water once moved in a slow, unimpeded sheet from Lake Okeechobee through the Everglades to the sea, it is now directed through drainage canals and related facilities away from the heavily populated areas of Broward and Dade Counties. See Pet. App. 2a-3a.

The SFWMD is the local sponsor of the Corps' Central and Southern Florida Project (C&SF Project), a vast system of levees, canals, water impoundment areas, and other water control structures. Congress authorized the Corps to construct the C&SF Project in 1948 to promote the multiple objectives of flood control, drainage, preservation of fish and wildlife, and control of regional groundwater and salinity in southern Florida. Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175. The SFWMD operates the C&SF Project in accordance with Corps guidelines. See Pet. 9; Pet. App. 2a-3a.

The SFWMD's water control activities have been the subject of previous litigation. In 1988, the United States brought an action against petitioner and the Florida Department of Environmental Regulation, alleging, among other things, that those agencies allowed phosphorus-polluted water to be diverted into the Everglades National Park in violation of state law and federal contracts. See *United States* v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995). The presence of abnormal levels of phosphorus adversely impacts the unique aquatic flora and fauna of the Everglades system, which thrive in a phosphorus-restricted environment.

The 1988 lawsuit resulted in a 1992 consent decree that required petitioner to construct stormwater-treatment

areas, which are marshes designed to filter nutrients from farm-water runoff that might otherwise adversely affect the Everglades National Park. See 847 F. Supp. at 1569-1570. The consent decree also required Florida to establish a permitting program to improve the quality of runoff entering the Everglades. *Ibid.* The Florida Legislature later enacted the Everglades Forever Act of 1994 to facilitate implementation of the consent decree. See Fla. Stat. Ann. § 373.4592 (West Supp. 2003).

Congress has assisted the State of Florida and the SFWMD in addressing Everglades water quality issues. In 1996, Congress directed the Secretary of the Army to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem." Water Resources Development Act of 1996 (WRDA 1996), Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767. Congress specified that the Secretary's plan "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades." *Ibid.* Congress also directed the Secretary to include features as "necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project." 110 Stat. 3767, 3768. Congress further directed the Secretary to develop the plan in coordination with the SFWMD and in consultation with the South Florida Ecosystem Restoration Task Force, an intergovernmental body (with representatives from the SFWMD and one of the respondents, the Miccosukee Tribe) charged with coordinating the development of federal, state, and tribal policies and strategies to restore and protect the Everglades. WRDA 1996 § 528(f), 110 Stat. 3770-3772.

Four years later, Congress approved the Secretary's Comprehensive Everglades Restoration Plan (CERP) through the Water Resources Development Act of 2000

(WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. The CERP provides for modifications of the C&SF Project to "restore, preserve, and protect the South Florida ecosystem," including the Everglades, "while providing for other water-related needs of the region, including water supply and flood protection." WRDA 2000 § 601(b)(1)(A) and (f)(2)(A), 114 Stat. 2680-2681, 2686. Congress specifically defined the term "South Florida ecosystem" to mean the area "within the boundary of the South Florida Water Management District," including "the Everglades." WRDA 2000 § 601(a)(5), 114 Stat. 2680.

The CERP is intended, among other things, "to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem." WRDA 2000 § 601(b)(1)(A), 114 Stat. 2681. To achieve the CERP's goals, Congress has authorized more than one billion dollars in initial projects. See, *e.g.*, § 601(b)(2), 114 Stat. 2681-2683. In implementing those projects, the Secretary must "ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." § 601(b)(2)(A)(ii)(II), 114 Stat. 2681. The Secretary implements those projects in cooperation with the SFWMD.[2]

C. The Water Control Facilities At Issue

The dispute in this case arises from the SFWMD's operation of water control facilities that are part of the C&SF Project. Those facilities transport excess water from areas of Broward County westward through the C-11 canal to a

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[2] The CERP is described in detail at the CERP Website: *http://www.evergladesplan.org/*.

water conservation area, WCA-3A, to prevent flooding of heavily populated residential and commercial areas.

The Army Corps of Engineers initially constructed what is now known as the C-11 canal to facilitate drainage and development of Broward County. Later, as part of the C&SF Project, the Corps built two north-south levees, L-33 and L-37, which form the western boundary of the C-11 basin and create WCA-3A, which extends west of the levees. Pet. App. 3a & n.2, 8a & n.8, 28a. The C&SF Project added the S-9 pumping station to transport water from the C-11 canal, through the L-33 and L-37 levees, into WCA-3A. The S-9 pumping station is located where the two levees meet, at the north end of L-33 and the south end of L-37. Petitioner now operates the S-9 pumping station, which is the specific facility at issue in this case. See Pet. App. 2a-3a; see also Pet. 9-10.

The S-9 pumping station transports the run-off collected by the C-11 canal, as well as seepage from WCA-3A into the C-11 basin, through three pipes that discharge water into WCA-3A at the rate of 960 cubic feet per second per pipe. Petitioner has obtained a water quality permit for the S-9 pumping station pursuant to the Everglades Forever Act. See Pet. 12; Fla. Stat. Ann. § 373.4592(9)(k) and (l) (West Supp. 2003). See also WRDA 2000 § 601(b)(2)(A)(ii)(I), 114 Stat. 2681 (requiring that CERP projects "take into account the protection of water quality by considering applicable State water quality standards").[3]

[3] A significant amount of water seeps from WCA-3A through the levees into the C-11 basin. As part of the CERP, Congress has authorized a levee seepage management project for WCA-3A and a neighboring water conservation area at a total cost of $100,335,000. WRDA 2000 § 601(b)(2)(C)(iv), 114 Stat. 2682. That project, which is scheduled to begin in September 2004, will be located just south of the S-9 pumping station. Congress also authorized $124,837,000 for a C-11 impoundment and stormwater treatment area. WRDA 2000 § 601(b)(2)(C)(v), 114 Stat. 2682. That project will manage the runoff from the western C-11 basin by capturing it in a stormwater impoundment for treatment before it enters WCA-3A. Those projects are described in detail at the CERP Website: *http://www.evergladesplan.org/*.

The S-9 pumping station transports water from the C-11 canal to WCA-3A, but it does not add anything to the waters being pumped. The water that the C-11 canal collects and that the S-9 pumping station conveys, however, contains phosphorus at levels higher than those found in WCA-3A. The excessive phosphorus originates from the various point and nonpoint sources that drain into the C-11 canal. See Pet. App. 3a.

D. The Proceedings In This Case

Respondents brought this citizen suit under Section 505 of the CWA, 33 U.S.C. 1365, alleging that the SFWMD is in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a). Respondents specifically alleged that the Clean Water Act requires the SFWMD to obtain an NPDES permit pursuant to Section 402, 33 U.S.C. 1342, for operation of the S-9 pumping station. In respondents' view, the operation of the S-9 pumping station results in the addition of a pollutant to navigable waters from a point source. See Pet. App. 2a, 17a-18a, 20a-21a.

On cross-motions for summary judgment, the district court denied the SFWMD's motion and granted summary judgment to respondents. Pet. App. 2a, 20a-21a, 31a-32a. The district court first noted the parties' agreement that, for purposes of the Clean Water Act, the C-11 canal and WCA-3A are "navigable waters" and the water that the S-9 pumping station pumps into WCA-3A contains "pollutant[s]." *Id.* at 21a. It then concluded that "an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United

States water with * * * different quality levels." *Id.* at 28a. The court further concluded that the S-9 pumping station "is a point source for which a NPDES permit is required." *Id.* at 29a. The district court enjoined the SFWMD from operating the S-9 pumping station without an NPDES permit, but stayed its ruling pending appeal. *Id.* at 2a, 12a & n.12, 31a-32a.

The court of appeals affirmed "the district court's judgment that the [SFWMD] violated the Clean Water Act," but vacated the injunction and remanded for further proceedings. Pet. App. 14a. The court of appeals concluded "that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters," *id.* at 7a, and that the S-9 pump station added pollutants to WCA-3A because, except for the operation of that pump station, the polluted waters from the C-11 canal would not have flowed there. *Id.* at 7a-9a. The court of appeals nevertheless vacated the district court's injunction because "the district court could not have correctly balanced the possible harms—especially the harm to the public—caused by the enjoinment of S-9 against the benefits when it granted its injunction." *Id.* at 13a. Instead, the court of appeals directed the district court to "order the [SFWMD] to obtain an NPDES permit within some reasonable time period." *Id.* at 14a.

SUMMARY OF ARGUMENT

The Clean Water Act does not require the SFWMD to obtain an NPDES permit for its S-9 pumping station, which merely conveys navigable waters from a water collection canal to a water conservation area. Congress did not intend to impose the NPDES permitting requirements on that water control facility or on the many comparable facilities throughout the Nation that do no more than convey or connect navigable waters. Rather, Congress contemplated that

water quality issues arising from the transportation of navigable waters would generally be addressed through federal and state mechanisms other than the NPDES permitting program.

A. Section 402(a) of the Clean Water Act requires an NPDES permit for the "discharge of any pollutant," which Section 502(12) of the Act defines as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1342(a), 33 U.S.C. 1362(12). The S-9 pumping station does not add pollutants to "navigable waters," which Section 502(7) further defines as "the waters of the United States," 33 U.S.C. 1362(7). Rather, the pumping station merely transports navigable waters from one location to another. Any pollutants in the C-11 canal are already in "the waters of the United States" when those waters enter the S-9 pumping station for discharge into the WCA-3A water conservation area. The pumping station accordingly does not introduce any pollutants into the waters of the United States from the outside world. The same result follows whether the C-11 canal and the water conservation area are viewed as a single body or separate bodies of navigable water. In either case, the S-9 pumping station transports "waters of the United States" that already contain pollutants from one location to another; it does not add pollutants to "the waters of the United States."

B. The court of appeals erred in concluding that a point source adds a pollutant whenever the point source might be characterized as the "cause-in-fact" of the presence of pollutants in a navigable waterbody. That test reaches far beyond the Clean Water Act's terms, which define a "discharge of a pollutant" to mean the actual release of pollutants into "the waters of the United States." The court correctly rejected the notion that pollutants can be added "from" a point source only if the point source itself generates or is the originating source of the pollutants. But it is not the case

that the point source need only be a "but-for cause" of the presence of pollution in a particular body of navigable waters. The point source must do more than merely convey or connect navigable waters that already contain pollutants. Rather, it must convey a material that qualifies as a pollutant from the outside world into "the waters of the United States."

C. The Clean Water Act, read as a whole, fully supports the conclusion that Section 402 does not require an NPDES permit for water control facilities that merely convey or connect navigable waters. Congress recognized that the States have important responsibilities in distributing and allocating water and that the Clean Water Act's requirements should not unduly interfere with those responsibilities. Congress also made clear that many serious water quality issues, such as the problem of nonpoint source pollution, must be addressed through mechanisms other than the NPDES permitting program. The Clean Water Act, as well as other federal legislation, accordingly provides alternative means for addressing water quality issues that result from the construction and operation of water resource development projects. Congress and the State of Florida have specifically provided mechanisms for comprehensively addressing the water quality issues in the South Florida ecosystem. The court of appeals' mistaken imposition of NPDES permitting requirements on the S-9 pumping station is unlikely to provide any substantial environmental benefits. Rather, it would likely misdirect governmental resources and potentially hinder the Everglades restoration process.

ARGUMENT

THE CLEAN WATER ACT DOES NOT REQUIRE THE SFWMD TO OBTAIN AN NPDES PERMIT FOR OPERATION OF WATER CONTROL FACILITIES THAT MERELY CONVEY OR CONNECT NAVIGABLE WATERS

The Clean Water Act requires the SFWMD to obtain an NPDES permit if the SFWMD's activities add a pollutant to navigable waters from a point source. The Act does not require an NPDES permit, however, for activities that involve nothing more than conveyance or connection of navigable waters. Nor does it require an NPDES permit simply because a point source might be described as "the cause-in-fact" of a release of pollutants into navigable waters. The text and structure of the Clean Water Act make clear that Congress had no intention to subject ordinary water control and distribution activities, including the typical operation of flood control projects, reclamation projects, and other such water diversion projects, to the NPDES permitting regime. Rather, Congress determined that the water quality issues arising from those activities should be addressed through other programs that provide alternative means of achieving the Clean Water Act's goals.

A. The Clean Water Act's Definition Of "Discharge Of A Pollutant" Does Not Include Activities That Merely Convey Or Connect Navigable Waters

The Clean Water Act's NPDES permitting requirements, set out in Section 402, apply only to the "discharge of any pollutant." 33 U.S.C. 1342(a). Section 502(12) of the Clean Water Act defines "discharge of a pollutant," in relevant part, as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). That definition has a broad reach, but it does not, by its express terms, include the operation of the S-9 pumping station, which

merely transfers concededly "navigable waters" from a water collection canal through a levee to a water conservation area.

Section 502(12) makes clear that, in order to qualify as a "discharge of a pollutant," the activity must add a pollutant from a "point source" to "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. 1362(12); see CWA § 502(7), 33 U.S.C. 1362(7); 40 C.F.R. 122.2. Section 502(12) cannot reasonably be understood to include an activity that merely transports navigable waters from one location, through a "point source," to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an "addition" of any pollutant to "the waters of the United States." See *Webster's Third New International Dictionary* 24 (1993) (defining "addition" in relevant part, as "the joining or uniting of one thing to another"). Whatever pollutants the waters contain are already *in* "the waters of the United States" when those waters pass through the "point source." The point source merely conveys those waters, which retain their status as navigable waters.

For example, a water resources project might require the transportation of navigable waters to a reservoir for retention and later release, and the storage of the water may induce changes in water quality and pollutant levels, including, for example, changes in chemical, physical, and biological characteristics. Nevertheless, EPA and the lower courts have long recognized that the process of merely transporting, impounding, and releasing navigable waters that may already contain pollutants does not constitute an "addition" of pollutants to "the waters of the United States" in the sense that the Clean Water Act uses those terms. Rather, an "addition from a point source occurs only if the point source itself physically introduces a pollutant into water

from the outside world." *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

In *Gorsuch*, environmental plaintiffs petitioned EPA to impose NPDES permit requirements on dams that stored and periodically released water. The impoundment and release of stored water resulted in "dam-induced changes," including low dissolved oxygen, dissolved minerals and nutrients, temperature changes, and supersaturation. 693 F.2d at 161-164. The District of Columbia Circuit concluded, in accordance with EPA's views, that the dam operator did not need to obtain an NPDES permit. *Id.* at 161, 170-183. Similarly, in *Consumers Power*, environmental plaintiffs sought to impose NPDES permit requirements on a hydroelectric facility that drew water from Lake Michigan into a man-made impoundment above a dam and generated power by discharging the lake water back into the lake through the dam's turbines. 862 F.2d at 581-583. Like the District of Columbia Circuit, the Sixth Circuit agreed with EPA's position that the dam operator did not need to obtain an NPDES permit, stating that the "facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States." *Id.* at 581. See *id.* at 586 (the pollutants "always remain within the waters of the United States, and hence cannot be added").[4]

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[4] The Sixth Circuit and the District of Columbia Circuit each grounded its decision, in significant part, on deference to EPA's views. See *Consumers Power*, 862 F.2d at 584; *Gorsuch*, 693 F.2d at 161, 170-183. That result also follows based on a straightforward reading of the Clean Water Act's text. See *Missouri ex rel. Ashcroft* v. *Department of the Army*, 672 F.2d 1297, 1303-1304 (8th Cir. 1982) (holding that dam-induced changes in water quality such as soil erosion and reduced oxygen did not constitute the addition of a pollutant from a point source).

Three courts of appeals, including the court of appeals below, have nevertheless suggested that a distinction should be drawn if the water control facility transfers water between two separate bodies of water. Pet. App. 7a-8a & nn. 7-8; *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 490-492 (2d Cir. 2001); *Dubois* v. *United States Dep't of Agriculture*, 102 F.3d 1273, 1296-1299 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997). The court of appeals in this case, for example, reasoned that, while the C-11 canal and WCA-3A are "waters of the United States," they are "two separate and distinct bodies of water." Pet. App. 8a n.8. The First Circuit in *Dubois* and the Second Circuit in *Catskill Mountains* reached similar conclusions under somewhat different facts. See *id.* at 8a n.7.[5]

The United States submits that the distinction suggested by those courts is unsound. The determination whether an NPDES permit is required should not depend on whether the water control facility at issue conveys waters of the United States from one location to another or whether it connects what are arguably two distinct bodies of navigable waters. So long as the water control facility at issue does not

[5] In *Dubois*, a ski resort proposed to transfer water from a river at the base of the ski slope, use it to operate snow-making equipment, and then discharge it into Loon Pond, a small naturally occurring lake, at a higher elevation. 102 F.3d at 1296-1297. The river would not normally flow into the pond, which was colder and had lower levels of phosphorus. *Id.* at 1298-1299. The court held that, regardless of whether the resort's snow-making equipment contributed additional pollutants, the transfer required an NPDES permit. *Id.* at 1296 n.29. Similarly, in *Catskill Mountains*, the court of appeals held that the City of New York's transfer of water allegedly containing suspended solids through a several-mile-long tunnel from a reservoir into a creek, which was naturally clearer and cooler than the reservoir and which the water would otherwise not reach, would also qualify as an "addition" of a pollutant that required an NPDES permit. 273 F.3d at 484-485, 492.

add pollutants to "the waters of the United States," an NPDES permit is not required. See *Gorsuch*, 693 F.2d at 175 (noting the United States' longstanding view that "the point or nonpoint character of pollution * * * does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)").

The Clean Water Act's definitions support that conclusion. Section 510(12) defines the "discharge of a pollutant" to include "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. 1362(12) (emphasis added). Its use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

If Congress had intended that the movement of one body of navigable waters into another body of navigable waters should be treated as the addition of a pollutant to navigable waters, it would have made that extraordinary intention manifest. At the least, it would have defined the "discharge of a pollutant" to include "any addition of any pollutant to [a specific portion of the] navigable waters from any point source," 33 U.S.C. 1362(12). Indeed, Congress elsewhere used precisely that type of phrase when it intended to refer to only a portion of "the waters of the United States," rather than the whole. See CWA § 302(a) 33 U.S.C. 1312(a) ("a specific portion of the navigable waters"). Congress would

not have extended NPDES permitting requirements to potentially thousands of water diversion facilities without any textual acknowledgment of that intention.

The court of appeals' distinction would also lead to incongruous and unmanageable results. As this case indicates, it is no simple matter to distinguish between "separate and distinct bodies of water." Pet. App. 8a n.8. The court of appeals recognized that the waters comprising the C-11 basin and the WCA-3A are hydrologically related and that, "[b]ut for man's intervention, these waters would essentially be a single body of navigable water." *Ibid.* The court provided no principled basis for treating the C-11 canal and WCA-3A as two separate bodies of water beyond the fact that "without the operation of the S-9 pump station," the water in the C-11 canal "would not normally flow" into WCA-3A. *Id.* at 8a. That mechanical test ignores the fact that those waters share a close hydrological association and are managed as a single water resource. Under the court of appeals' view, virtually any pumping station, dam, water diversion facility, or control valve could be viewed as creating "two separate and distinct bodies of water." *Id.* at 8a n.8.

The Court has no need to engage in the fruitless task of attempting to fashion a test that distinguishes between single and multiple waterbodies, because the Clean Water Act does not require any such test in this context. Section 402 requires a permit only if there is an addition of a pollutant to "the waters of the United States." An NPDES permit is unnecessary if the water control facility does no more than convey or connect such waters.

B. The Clean Water Act Does Not Require An NPDES Permit For Every Discharge From A Point Source That Might Be Described As "The Cause-In-Fact" Of The Release Of Pollutants Into Navigable Waters

The court of appeals' ruling that the SFWMD must obtain an NPDES permit for the S-9 pumping station should be reversed for the straightforward reason that the pumping station does not "add" pollutants to "the waters of the United States." Accordingly, there is no occasion to address the additional question whether the supposed addition was "from any point source." See CWA § 502(12), 33 U.S.C. 1362(12). Nevertheless, the court of appeals reached that issue, and it incorrectly concluded that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." Pet. App. 7a.

The court of appeals correctly rejected the SFWMD's argument (Pet. 20) that pollutants are added "from" a point source only if the point source itself is the origin of the pollutants. See Pet. App. 7a n.6. The District of Columbia Circuit rejected that interpretation more than 20 years ago. See *Gorsuch*, 693 F.2d at 175 n.58. A "point source" is, by statutory definition, a "discernible, confined, and discrete *conveyance*." CWA § 502(14), 33 U.S.C. 1362(14) (emphasis added). That definition signifies that a point source itself need not generate or be the originating source of the pollutant; it need only convey the pollutant into "the waters of the United States." That understanding is consistent with Section 502(14)'s representative examples, which include a "pipe, ditch, channel, tunnel, [and] conduit." 33 U.S.C. 1362(14). Those objects all typically transport, rather than generate, pollutants, such as "sewage," "biological mate-

rials," and "industrial, municipal, and agricultural waste," CWA § 502(6), 33 U.S.C. 1362(6).[6]

The court of appeals erred, however, in concluding at the other extreme that "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." Pet. App. 7a. The court reasoned that this result follows from the dictionary definition of "from," which can connote the "agent or instrumentality" or the "cause or reason." *Id.* at 7a n.6. The more apt definition, however, particularly in the context of a "point source," connotes a physical relationship, such as "a point or place where an actual physical movement * * * has its beginning." *Webster's Third New International Dictionary* 913 (1993). As explained above, Section 502(12)'s definition of the "discharge of a pollutant" is intended to encompass the actual release of a pollutant into "the waters of the United States." This case illustrates the distinction. The S-9 pumping station does not add pollutants to the waters of the United States "from any point source" because the pumping station does not physically add *anything* into those waters; instead, it merely conveys or connects navigable waters, which already contain pollutants.[7]

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[6] A requirement that a point source be the "original source" of a pollutant would also be inconsistent with the Clean Water Act's manifest aim to impose permitting requirements on facilities, such as publicly owned treatment works and municipal storm sewer systems, that do not themselves generate the pollutants in the water they treat, but do introduce those pollutants into the navigable waters. See CWA §§ 301(b)(1)(B), 402(p), 33 U.S.C. 1311(b)(1)(B), 1342(p).

[7] The activities at issue here stand in sharp contrast to other activities that have long been subject to the Clean Water Act's permitting requirements. For example, Section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into navigable waters. See *Rybachek* v. *EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, Section 404 of the Clean Water Act, which specifically addresses dredge and fill activities, subjects the deposit or redeposit of dredged or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. See 33 U.S.C. 1344; *United States* v. *Deaton*, 209 F.3d 331, 335-336 (4th Cir. 2000); *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503-1506 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923-925 (5th Cir. 1983).

The court of appeals' misdirected analysis highlights, however, a different and significant point. A pumping station or other water diversion facility may in fact add a pollutant to navigable waters if it does more than merely convey or connect those waters. For example, if the pumping station leaks oil, grease, or other pollutants into those waters, that addition is subject to NPDES permitting requirements. See *Consumers Power*, 862 F.2d at 586; *Gorsuch*, 693 F.2d at 165 n.22. Furthermore, if water is diverted from navigable waters for an intervening use, the water may lose its status as "waters of the United States" and consequently become subject, upon its reintroduction into navigable waters, to the NPDES permitting process. For example, an NPDES permit is normally required if an industrial user withdraws water from a navigable waterbody for process or cooling purposes and returns the used water into the same waterbody through a point source.[8] Similarly,

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[8] EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, *e.g.*, 40 C.F.R. 122.2 (definition of process wastewater); 40 C.F.R. 125.80-125.89 (regulation of cooling towers). EPA's regulations address pollutants that are contained in water withdrawn by a facility ("intake pollutants") that are subsequently returned to waters of the United States. See 40 C.F.R.122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Pt. 132, App. F Procedure 5-D and 5-E (containing regulations

an NPDES permit is normally required if a facility withdraws water from a navigable waterbody, removes preexisting pollutants to purify the water, and then discharges the removed pollutants (perhaps in concentrated form) back into the navigable waterbody while retaining the purified water for use in the facility.[9]

The question whether a particular water control facility adds or redeposits pollutants, and the question whether waters have lost their character as "waters of the United States" through intervening use, depend on the facts of the particular case. There is no reason to conclude, however, that the waters at issue in this case—and, most likely, the vast majority of waters that pass through pumping stations, dams, and water diversion facilities—are subject to NPDES requirements on those bases.[10]

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governing water-quality-based permitting of intake pollutants in the Great Lakes).

[9] For example, drinking water treatment facilities withdraw water from streams, rivers, and lakes. The withdrawn water typically contains suspended solids, which must be removed to make the water potable. The removed solids are a waste material from the treatment process and, if discharged into navigable waters, are subject to NPDES permitting requirements, even though that waste material originated in the withdrawn water. See, *e.g.*, *In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. Nov. 1, 2000) (rejecting, on procedural grounds, challenges to NPDES permits for two drinking water treatment plants that draw raw water from the Arizona Canal, remove suspended solids to purify the water, and discharge the solids back into the Canal); *Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire*, 65 Fed. Reg. 69,000 (2000) (NPDES permits for discharges of process waste waters from drinking water treatment plants).

[10] For example, the courts have long treated water that passes through dams, including associated power generation facilities, as retaining its character as navigable waters. See *Consumers Power*, 862 F.2d at 585-586; see also *Gorsuch*, 693 F.2d at 174-175. A fortiori, water that merely

C. The Clean Water Act Expresses Congress's Understanding That Facilities That Merely Convey Or Connect Navigable Waters Would Be Regulated Through Means Other Than the NPDES Permitting Program

The Clean Water Act, read as a whole, fully supports the conclusion that the NPDES permitting requirements do not apply to water control facilities that merely convey or connect navigable waters. The Act imposes a variety of regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b). The Clean Water Act expresses the understanding that, as a general matter, water control facilities that merely transport "the waters of the United States" to where they can be most beneficially used are not subject to the NPDES regime.[11]

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passes through a pumping station—without any intervening use or change in composition—retains that character as well.

[11] Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries, stating: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]." CWA § 101(g), 33 U.S.C. 1251(g). The legislative history reveals that "[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, *A Legislative History of the Clean Water Act of 1977*, at 532 (1978); see *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 721 (1994). The court of appeals' interpretation is in considerable tension with that congressional policy, because it could impose substantial obstacles to the operation of state water allocation systems. Indeed, while the court of appeals did not address the question, the rule of law adopted below could conceivably be viewed as imposing NPDES permitting requirements on an array of major water projects in the western United States, where

Congress could have expressly subjected water control facilities to the NPDES permitting program, but, as explained above, it did not. Instead, Congress directed EPA to provide federal, State, and area-wide planning agencies with information on "processes, procedures, and methods to control pollution resulting from," among other things,

> changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

CWA § 304(f)(2)(F), 33 U.S.C. 1314(f)(2)(F). Congress clearly understood that water control facilities could have an impact on water quality, but it concluded that those water quality impacts should be addressed primarily through means other than the Section 402 permitting process. Indeed, Congress recognized that the water quality issues arising from water control facilities are closely associated with "nonpoint sources" of pollution. The House Report, in its discussion of what ultimately became Section 304(f), emphasizes this point:

> Section 304 [f] addresses the problem of nonpoint sources of pollutants. This Section and the information on such nonpoint sources is among the most important in the 1972 Amendments. If our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent

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projects such as California's Central Valley Project move vast quantities of water among and within various bodies of water in order to meet a wide range of agricultural and other needs. See, *e.g.*, *California* v. *United States*, 438 U.S. 645 (1978). Nothing in the Clean Water Act's text or history suggests that Congress intended that result. See *id.* at 653 (noting the "consistent thread of purposeful and continued deference to state water law by Congress").

> in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as * * * natural and man made changes in the normal flow of surface and ground waters.

H.R. Rep. No. 911, 92d Cong., 2d Sess. 109 (1972).

Congress recognized that the operators of water control facilities are typically not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through sources located far from those facilities and beyond control of the project operators. Indeed, many of the water quality problems associated with the South Florida ecosystem, which originate with urban or agricultural runoff, reflect that reality. Congress properly envisioned that the project operators should not be saddled with curing those regional water quality problems through the Clean Water Act's NPDES permitting regime. Instead, those problems are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, *e.g.*, CWA § 102(b), 33 U.S.C. 1252(b) (reservoir planning); CWA § 208(b)(2)(F), 33 U.S.C. 1288(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA § 319, 33 U.S.C. 1329 (nonpoint source management programs); see also CWA § 401, 33 U.S.C. 1341 (state certification of federally licensed projects).

Water control facilities are also frequently subject to federal and state legislation, apart from the Clean Water Act, that identifies and addresses associated water quality issues. For example, federally funded projects invariably require executive recommendations and congressional authorization, which in turn trigger legislation such as the National Environmental Policy Act (NEPA), 42 U.S.C. 4321

et seq. NEPA requires that agencies include in every proposal for major Federal action significantly affecting the quality of the human environment a detailed statement of the project's environmental impact. 42 U.S.C. 4332. See, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) (applying NEPA to the Rogue River Basin federal water project).

As this case illustrates, Congress and affected States may themselves specify and fund particular initiatives to address water quality issues. Congress has authorized the CERP, which sets out a comprehensive integrated approach, supported by extensive federal funding, to restore the South Florida ecosystem. See WRDA 2000 § 601(b), 114 Stat. 2680-2681. The CERP not only addresses the impact of excessive phosphorus on that ecosystem, but it also addresses a host of other problems that affect regional water quality. That integrated approach will ensure that the water quality concerns of the area are resolved in a comprehensive manner that takes account of both water quality and water quantity issues. Florida, for its part, has enacted the Everglades Forever Act, which also addresses the ecosystem problems comprehensively. That Act specifically establishes a state permitting system for C&SF Project structures that discharge into the Everglades Protection Area, including the S-9 pumping station. See p. 10, *supra*.

Against this backdrop of concerted federal and state action, the imposition of NPDES permitting requirements is unlikely to serve any useful purpose. The respondents' insistence on the imposition of Clean Water Act requirements designed to address distinctly different issues would ultimately misdirect governmental resources toward unnecessary or duplicative processes and potentially hinder the Everglades restoration process.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2003

ADDENDUM

Pertinent Provisions of The Clean Water Act

Section 101, 33 U.S.C. 1251. Congressional declaration of goals and policy

* * * * *

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Section 301, 33 U.S.C. 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

Section 304, 33 U.S.C. 1314. Information and guidelines

* * * * *

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title * * * information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

* * * * *

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

* * * * *

Section 402, 33 U.S.C. 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318 and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator deter-

mines are necessary to carry out the provisions of this chapter.

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Section 502, 33 U.S.C. 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

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(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

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(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone

or the ocean from any point source other than a vessel or other floating craft.

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(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

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